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No. 318

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

JOHN JOSEPH ZIAK,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX

	PAGE
Judgment and Opinion of the Court Below	1
Statement of Jurisdiction	2
Questions Presented	2
Constitutional Provision, Statute and Rules Involved	3
Statement of the Case	3
Statement of Facts	4
Reason for Granting the Writ	7
Appendix A—Opinion	App. 1
Appendix B—Order dated April 20, 1966	App. 7
Appendix C—Order dated June 9, 1966	App. 8

TABLE OF AUTHORITIES CITED

Cases

	PAGE
Berger v. United States, 295 U.S. 78 (1935)	8
Delli Paoli v. United States, 352 U.S. 232 (1957)	14
Greenberg v. United States, 280 F.2d 472 (1st Cir. 1960)	9, 11
Johnson v. United States, 347 F.2d 803 (D.C. Cir., 1965)	15
Latham v. United States, 226 F. 420 (5th Cir., 1915)	8
Nations v. United States, 32 F.2d 598 (8th Cir., 1929)	9, 15
New York Central v. Johnson, 279 U.S. 310 (1929), p. 318	13
Read v. United States, 42 F.2d 636 (8th Cir., 1930)	15
Robinson v. United States, 32 F.2d 505 (8th Cir. 1928)	11
Taliaferro v. United States, 47 F.2d 699, 702 (9th Cir., 1931)	9
Turner v. United States, 35 F.2d 25 (8th Cir., 1929)	15
United States v. Graham, 325 F.2d 922 (6th Cir., 1963)	15
United States v. Schwartz, 325 F.2d 355 (3d Cir., 1964)	15
United States v. White, 324 F.2d 814 (2d Cir., 1963)	9
Washington v. United States, 327 F.2d 793 (5th Cir., 1964)	15

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To The Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner, John Joseph Ziak, prays that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURT BELOW

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on April 20, 1966, and is not yet reported; it appears in the printed appendix

filed with, and certified by, the Clerk of the United States Court of Appeals as a part of this record, and transmitted herewith.

The Petition for Rehearing was denied on June 9, 1966, and the order denying the Petition is set forth in the Petitioner's Appendix hereto and in the certified copy of the record.

STATEMENT OF JURISDICTION

The order of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division was filed on April 20, 1966. On the 9th day of June, 1966, it was ordered that the Petition for Rehearing be denied. This Petition is filed within 30 days after the denial of the Petition for Rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. May a Court of Appeals affirm a conviction, after finding prejudicial misconduct by the government, on the theory that the jury disregarded the prejudicial misconduct, when the trial judge overruled defense objections to the conduct and did not instruct the jury to disregard it.

2. Can the Sixth Amendment guarantee of fair trial remain meaningful when it is protected ONLY by the speculation of a Court of Appeals on what an uninstructed and unguided jury might have done?

CONSTITUTIONAL PROVISION, STATUTE AND RULES INVOLVED

Amendment VI to United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; and to be confronted with witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE.

This action was commenced by the return of an indictment charging the Petitioner, John Ziak, in two counts, with violating Section 174, Title 21, United States Code, in that he knowingly received, concealed, purchased, sold and facilitated the transportation, concealment and sale of narcotic drugs and that he conspired to do the above acts with Sylvester Moore an unindicted conspirator (Pet. App. 2). Petitioner's trial commenced on March 1, 1965, and resulted in the jury's verdict of guilty as charged in both counts of the indictment. (Pet. App. 1). Upon the return of the verdict of guilty Petitioner on March 3, 1965 was sentenced to the custody of the Attorney General for imprisonment for a period of eight years on each count, said sentences to run concurrently with each other. (Pet. App. 1). Notice of Appeal was timely filed on March 11, 1965. (Pet. App. 1).

STATEMENT OF FACTS.

William H. Turnbou testified that as a Federal Narcotics Agent, on November 12, 1963, he purchased narcotics from Sylvester Moore, an unindicted co-conspirator. The arrangements were made through an informant in Agent Turnbou's presence. The transaction occurred in the informant's home. (Pet. App. 13-14). Turnbou further testified that on November 26, and December 9, 1963, he and the informant purchased narcotics from Sylvester Moore. (Pet. App. 14-15). On November 26, 1963, Turnbou received $900 in official advance funds from Agent George Halpin, and was driven by Halpin to 639 South Ingleside, Chicago, Illinois. Agents Halpin and Raebel then proceeded to 8358 South Ellis, Chicago, Illinois. The testimony indicated that at 7:30 p.m. on that evening, the Petitioner, John Ziak, arrived in a blue-panel truck, license No. PN-6574 which license number was registered to Paul Ziak, Chicago, Illinois, and entered the building at 8358 South Ellis. (Pet.App. 6). A few minutes later Ziak came out and drove away. Thereafter Moore drove to 6032 South Ingleside. Moore entered the building located at that address, then left and met Ziak at 60th and Ingleside and handed something to Mr. Ziak. Moore then returned to 6032 South Ingleside and delivered the heroin to Turnbou. (Pet.App. 6).

Agent Halpin testified that on December 9, 1963, at 6 p.m., he watched Mr. Ziak make three telephone calls and then proceed to 8358 South Ellis and enter a building. Fifteen minutes thereafter Moore came out of the building and drove away. Ziak then left the building and drove to 60th and Ellis and parked. Moore drove up and they had a conversation. Agent Raebel testified that Moore

then gave Ziak a large quantity of United States currency. Moore then delivered the heroin to Agent Turnbou at 632 South Ingleside. (Pet.App. 6).

Mr. Ziak was arrested on April 27, 1964 as he was leaving a truck. Agent James P. Kennedy testified that he discovered a brown paper bag which contained heroin inside the truck. Agent Kennedy stated that at the time of the arrest, Ziak denied knowing Moore and denied receiving money from Moore.

Mr. Ziak denied the charges of the indictment. He testified that Moore had made race track bets with the defendant, and had paid the defendant large amounts of money for these bets at 60th and Ellis in Chicago, Illinois. (Pet.App. 7).

During the course of his final argument, the government prosecutor, Mr. Brown, in an attempt to explain why he did not call other agents to corroborate, Agent Hughes stated:

> "I didn't subpoena them. And I will tell you why I didn't call them in to testify—because I won't insult this man right here, Narcotic Agent Hughes. I'm not going to put those men on the stand to swear to God and in front of you that he is telling the truth. I know him and I won't do it." (R. 364).

The prosecutor's argument continued to discuss the credibility of witnesses. Mr. Brown, the prosecutor, took the witness stand and said, in part,

> "* * * It's a sad day not for Ziak, not for the country, but for everybody when the Federal Government would attempt to frame somebody. And I submit to you that we have not, we didn't in this case, and we won't. And there is a very good point to bring out on that.

> He said we framed him. That's what he is telling you—that all of these agents got up on the stand and committed perjury. I told you in advance that I had talked to all the witnesses, and I suppose the next thing is that I suborned the perjury. Well, whatever the facts may be as far as he is concerned, let me say this to you: If we had wanted to frame the defendant, don't you think that we would have done it on the whole cloth? At the time of his arrest, Hughes would have marched up on the stand along with six other agents, and sat down on witness stand and said, 'Ziak, we caught you selling narcotics. You and Moore were in a conspiracy.' And what would he have said if he wanted to frame him? He would have said, 'Ziak told them'—" (Appendix A, page 5, *infra*)

At this point the defense counsel objected to such an argument being made from the witness stand; however, the trial court overruled the objection. (Appendix A, page 5, *Infra*)

The prosecutor later argued that

> "Ladies and gentlemen, these agents came in and told you the truth. They told you the way it happened. * * *" (Appendix A, page 6, *Infra*)

REASON FOR GRANTING THE WRIT

This Court should resolve the conflict among the circuits relating to the sanctions to be employed when a Court of Appeals finds that a prosecutor has committed prejudicial misconduct.

I.

Though condemning the tactics used in the prosecution of petitioner Ziak, the Court of Appeals refused to reverse the conviction resulting from these tactics. The court established the standard, but failed to establish the sanction necessary to make the standard meaningful. Though a prosecutor might refrain from employing the particular methods used to convict the petitioner, he might well conclude that a deft and subtle change in tactics used against petitioner would result in another conviction without reversal.

Unless reversed by this court, the decision below in this case will immunize the prosecutor from rules and sanctions applicable to trial counsel. In affirming petitioner's conviction, the Court of Appeals has allowed an Assistant United States Attorney to succeed in:

(i) Telling the jury he personally thought the government witnesses were truthful.

(ii) Telling the jury a failure to convict was an attack upon his integrity and the integrity of the United States Government.

Each of these tactics is in and of itself cause for reversal under the decisions of this and other courts.

A.

Canon 15 of the Canons of Professional Ethics provides that it is improper for counsel to assert his personal belief in the justice of his cause. The reasons for proscribing counsel's assertions of personal belief are obvious: no witness would ever be permitted so to testify, much less a participating lawyer who is neither under oath nor subject to cross-examination; and counsel's personal opinion of the case has no bearing on the issue before the jury. See Drinker, Legal Ethics, 147 (1953).

As explained by this Court in *Berger* v. *United States*, 295 U.S. 78 (1935), the prosecutor is in a peculiarly sensitive position as a servant of the law, "the twofold aim of which is that guilty shall not escape nor innocent suffer." With this twofold obligation the prosecutor must be particularly sensitive to the rule and policy of Canon 15. As a representative of the United States, the prosecutor's excursions beyond the boundaries of Canon 15 are doubly dangerous. The peculiar position of the prosecutor was well described by the court in *Latham* v. *United States*, 226 F. 420 (5th Cir., 1915):

> "The prosecuting officer is usually a person of considerable influence in the community, and the fact that he represents the government of the United States lends weight and importance to his utterances. He does not occupy the position of a defendant's counsel, but appears before the jury clothed in official raiment, discharging an official duty. The realization of these considerations should lead the officer to the exercise of the utmost care and caution in making statements before the jury, and should induce him to confine his arguments and statements to the testimony of the witnesses, in order that no right of the defendant is violated."

See also *Greenberg* v. *United States*, 280 F.2d 472 (1st Cir. 1960):

> "To permit counsel to express his personal belief in the testimony (even if not phrased so as to suggest knowledge of additional evidence not known to the jury), would afford him a privilege not even accorded to witnesses under and subject to cross-examination. Worse, it creates the false issue of the reliability and credibility of counsel. This is peculiarly unfortunate if one of them has the advantage of official backing."

In his effort to convict petitioner, the government prosecutor, Mr. Brown, told the jury that he knew the agents who testified and that since he knew them he saw no reason to bring in other agents to corroborate the original testimony. Mr. Brown further stated that the agents "came in and told you the truth." This constitutes nothing less than the prosecutor's personal endorsement of his own witness' credibility, precisely the sort of behavior which Canon 15 and the cited cases condemn. The First Circuit faced the same situation in *United States* v. *White*, 324 F.2d 814 (2d Cir., 1963). Although the reversal was based on the trial court's refusal to adjourn the trial until a defense witness recovered from illness, the court counseled that a prosecutor cannot be allowed, even indirectly to assert his personal belief in the veracity of his witnesses. In *White*, the prosecutor had said only that the government did not call certain witnesses because they were unreliable. This, the *White* court stated, amounted to a personal endorsement of the witnesses actually presented and was conduct beyond the boundaries of Canon 15. See also *Nations* v. *U. S.*, 32 F.2d 598 (8th Cir. 1929); and *Taliaferro* v. *U. S.*, 47 F.2d 699, 702 (9th Cir. 1931).

The argument made against petitioner presents a more compelling situation. The representative of the government told the jury directly and positively that he could assure them that the agents were truthful. This alone is enough to reverse this case.

B.

In the course of his final argument, the Assistant United States Attorney told the jury that *he* knew the witnesses and that *he* had questioned the witnesses before the trial and that the defense in its denial of the transactions alleged by the witnesses was charging that *he* was suborning perjury. (See Court of Appeals opinion, 4-5.) The prosecutor thus injected into the jury's deliberations the totally extraneous issue of *his* credibility. This is especially so since these remarks were made during an argument in which the prosecutor was seated in the witness chair. Although he was neither sworn nor cross-examined, he was in effect asking the jury to determine whether or not he was a man of integrity to decide his credibility, not whether petitioner Ziak was guilty as charged. He was asking them to divert their attention from the issues of the case and instead focus on the way *he* handled the case.

We contend that the approval of this action by the Court of Appeals reduces the decision-making process in a criminal case to a decision of whether the jury happened to approve of the prosecutor and of his handling of the case. Such a decision cannot be allowed to stand.

The credibility of the prosecutor, or any other counsel, is not and cannot be a factor in the jury's deliberations. The jury is there to decide solely on the guilt or innocence of the accused by determining the credibility of the witness.

The conduct and integrity of the prosecutor should not affect its decision in any way. In *Greenberg,* 280 F.2d 472 (1st Cir. 1960), the court stated categorically that permitting the prosecutor to rely on his own untested assertions of fact "creats the false issue of the reliability and credibility of counsel." The court reasoned that as an advocate the prosecutor cannot be allowed to use his own testimony to usurp the jury's "quasi-judicial function" of determining the credibility of the witnesses, thereby determining the guilt or innocence of the accused. As an advocate, the government's counsel cannot be allowed to determine the credibility of the witnesses; he can only present the witnesses for a determination of their credibility *by the jury.*

The prejudice to the litigant which results from injecting the issue of credibility of counsel is multiplied when counsel is a representative of the United States. As the conduct of this case shows, the argument can leave the jury with the impression that if it fails to convict the accused, its verdict will stand as a censure of the conduct of the representatives of the United States. This again injects a false issue into the case diverting the jury's attention from the issue of guilt. A representative of the government made precisely this argument in *Robinson* v. *United States,* 32 F.2d 505 (8th Cir., 1928), and the resulting conviction was reversed. The jury was told that a failure to convict would malign the efficiency of government agents and "in that way result in an irreparable injury to the public." This, the court held, was not the issue to be decided by the jury, and the conviction was reversed.

The decision which we ask this court to review immunizes the government attorney from the only effective censure, reversal of the case. If such a decision is allowed

to stand, it will result in irreparable injustice. The only beneficiary of such a procedure will be the prosecutor and his record of convictions.

II.

Undoubtedly the most startling aspect of the decision below is the unprecedented logic used by the Court of Appeals to affirm the conviction. First the court noted its disgust with the prosecutor's "theatrical tactics" and antics:

> "Here was a prosecutor sitting in the place reserved for persons who customarily give testimony upon which juries rely in deciding cases. It is an historical location in every American courtroom. It is a symbol of truth and justice and so recognized by the triers of fact. Yet on the important issue of the veracity of government witnesses, a lawyer for the government was permitted to occupy that seat and, without being sworn as a witness, was allowed to tell the jurors that the government agents told them the truth.
>
> "We disapprove of such theatrical tactics in a federal court of law."

But, despite its stated disapproval of such tactics, the Court of Appeals did not see fit to implement its opinion with a reversal of the conviction resulting from the tactics condemned. Instead the Court of Appeals decided to let Petitioner's guarantee of a fair trial rest on its "abiding confidence that the intelligence of the jurors in fact rejected this performance." (Opinion, 5).

We submit that this result must be reviewed by this court for three reasons. First, the proposition advanced by the Court of Appeals in its decision is based on fallacious and dangerous logic which, if followed in later cases, can result only in the withering away of important mechanisms

for enforcing the guarantee of fair trial. Second, the inevitable effect of the failure to reverse, as shown in the prosecutor's approach to the appeal of this case, will be to encourage the prosecutor in his efforts to ignore rules of propriety and do whatever is necessary to win a conviction. And third, the result is contrary to the result reached in other circuits facing similarly prejudicial prosecutor misconduct.

If this jury had been instructed to disregard the prosecutor's performance, the court's confidence in the intelligence of the jury might be justified. But this jury had not been told any such thing. Instead, the trial court summarily overruled defense counsel's objections, and the prosecutor was permitted to remain in the witness chair and continue his assurances to the jury that he knew the agents were telling the truth. The only conceivable inference a juror could draw from these events is that the trial judge himself approved of the prosecutor's argument and that the prosecutor's testimony could now be added to the evidence against petitioner. Indeed, after hearing both the prosecutor and the trial judge endorse the credibility of the government evidence, the juror could only conclude that it was now his civic duty to convict. See *New York Central v. Johnson*, 279 U.S. 310 (1929) at P. 318.

We submit that without an instruction to disregard the prosecutor's performance, the Court of Appeals conclusion that the jury undoubtedly disregarded it is as fallacious as it is dangerous. Under the court's rationale, the protection for petitioner's right to a fair trial now becomes nothing more than an unsupported assumption by an appellate court that the jury took a more critical view of the argument than the trial judge himself. Under the proposition advanced by the Court of Appeals, a defendant's chances for a fair

trial now depend on what an appellate court imagines an unguided jury might have done. As the result of this case shows, the appellate court can now rely on the most improbable inference of jury behavior to conclude that the accused was afforded a fair trial.

The Court of Appeals reached this conclusion at a time when even a jury verdict tempered by clearly-stated instructions to disregard inflammatory matter are subject to grave doubt. In the learned dissent of Mr. Justice Frankfurter in *Delli Paoli* v. *United States*, 352 U.S. 232 (1957), he stated that instructions to disregard inadmissible matter were "intrinsically ineffective" as a protection of the right of the accused to a fair trial. If such instructions are subject to this degree of doubt, then certainly this Court of Appeals cannot be allowed to rely on the jury to disregard *sua sponte* arguments it does not know were improper.

In its briefs on the original appeal and in opposition to a Petition for Re-hearing, the government indicates it sees nothing wrong with the way its representative argued his case in the trial court. Indeed, the government says that a personal endorsement of the prosecution evidence while sitting in the witness stand was perfectly justifiable "astute advocacy." (See Govt. Brief, 15). Later, in its answer to a Petition for Re-hearing, the government tells us its representative was simply "attempting to give the jury a graphic illustration of the absurdity of this defense." (At Page 2).

Thus it is clear that the government has failed to apprehend the lesson which the Court of Appeals attempted to teach in the language of its opinion. Indeed, the government seems to think that "astute advocacy" demands that

it use final argument to testify on its opinion of its evidence and the defense evidence. It is apparent that the government feels confident that it can skirt the rules in attempting to win a conviction, always assured that its behavior will be sanctioned only by language of reprimand from the Court of Appeals. The conviction which results as this case illustrates, will stand.

We contend that it is the duty of this court to reverse petitioner's conviction, thereby notifying the prosecutor that he is subject to the same standards and sanction applied to other counsel. Language in an appellate court opinion is not enough to teach the lessons of propriety.

Other circuits, recognizing that the only way to enforce standards of proper argument is to reverse the resulting convictions, have reversed in comparable situations, often even when the trial judge had told the jury to disregard the prejudicial argument. See *Washington* v. *United States*, 327 F.2d 793 (5th Cir., 1964) and cases cited therein; *United States* v. *Schwartz*, 325 F.2d 355 (3d Cir., 1964); *United States* v. *Graham*, 325 F.2d 922 (6th Cir., 1963); *Read* v. *United States*, 42 F.2d 636 (8th Cir., 1930); *Nations* v. *United States*, 32 F.2d 598 (8th Cir., 1929); *Turner* v. *United States*, 35 F.2d 25 (8th Cir., 1929); and *Johnson* v. *United States*, 347 F.2d 803 (D.C. Cir., 1965).

The Court of Appeals for the Seventh Circuit, however, shows in its opinion affirming petitioner's conviction that it does not think a reversal is necessary. We submit that it is incumbent upon this court to resolve this conflict in the various circuits.

Respectfully submitted,

RAYMOND J. SMITH
DORIS A. COONROD
Attorneys for Petitioner

APPENDIX

APPENDIX A.

In the

United States Court of Appeals

For the Seventh Circuit

No. 15175 SEPTEMBER TERM, 1965—APRIL SESSION, 1966

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

JOHN JOSEPH ZIAK,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

APRIL 20, 1966

Before SCHNACKENBERG, CASTLE and SWYGERT, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* John Joseph Ziak, defendant, appeals from a judgment order, based on a jury verdict, convicting him of violations of § 174 Title 21 United States Code as amended by the Narcotic Control Act of 1956, as charged in counts 1 and 2 of an indictment. Defendant was committed to custody of the attorney-general for a period of eight years on each of said counts, said sentences to run concurrently with each other.[1]

[1] Defendant's motion for a new trial and his motion in arrest of judgment were overruled.

1. Count 1 charged a conspiracy between defendant and Sylvester Moore, who was not named as a defendant herein, to unlawfully traffic in narcotics, and charged several overt acts in pursuance thereof, while count 2 charged Ziak with unlawfully trafficking in narcotics on or about April 24, 1964.

It is the contention of Ziak that the evidence offered by the government to establish its case does not in fact prove a conspiracy or that Ziak was a conspirator.

The government, relying on the principle that after a verdict of guilty this court will view the evidence in the light most favorable to the government, although the testimony of defendant may not be ignored, asserts that the evidence revealed a conspiracy between defendant and Moore as charged. We have carefully considered this evidence. We hold that, viewed as a whole, it was ample to sustain the jury's verdict that defendant and Moore were engaged in an illegal conspiracy for the sale of narcotics.

2. During the trial Ziak's counsel called to the attention of the district court the fact that Ziak was arrested as a result of a complaint based on transactions occurring about four months prior to the arrest. Ziak was arrested as he alighted from a Ford panel truck. He was searched and placed by the truck with his hands on the side of the vehicle while narcotics agent Kennedy searched the truck, finding above the sun visor a brown sack containing narcotics.

From the testimony it appears that an arrest warrant was obtained shortly after the agents received a statement from Moore in 1964. The contents of the statement were not made a part of the record.

While counsel for Ziak admits that the law is that an automobile may be searched without a search warrant where "there is strong reference to mobility and urgency", he says that here Ziak was in custody and there was no showing of mobility or urgency.

Ziak's counsel distinguishes *Armada* v. *United States,* 5 Cir., 319 F. 2d 793 (1963) on the ground that in that case the facts revealed that the agents knew of the presence of narcotics in a certain suitcase. The agents knew that Armada took the suitcase out of a hotel and when approached by agents he admitted the car was his and that that suitcase was in its trunk. There being no warrant for Armada, he could have driven the car away unless it was seized. Hence, counsel says, the court at 797 stated:

> "Before making the search of the automobile, the agents had information which constituted probable cause to believe the suitcases contained cocaine, and Armada had admitted the suitcase 'is right there in the car.' Unless Armada was arrested or the car was seized, the automobile could readily be moved."

Counsel says that no such facts existed with reference to Ziak.

Defense counsel also relies on *Sirimarco* v. *United States,* 10 Cir., 315 F. 2d 699 (1963), dissenting opinion at 702, cert. denied, 374 U.S. 807 (1963).

On the other hand, the government points out that Ziak was arrested as he alighted from his truck and that he does not question the validity of the arrest. It says the search was conducted immediately incident to the arrest. We hold it was therefore valid. *Carroll* v. *United States,* 267 U.S. 132, 158 (1925); *United States* v. *Walker,* 4 Cir., 307 F.2d 250, 252 (1962); *United States* v. *Pisano,* 7 Cir., 193 F. 2d 361 (1951); *United States* v. *Jones,* 7 Cir., 340 F. 2d 913 (1964).

Moreover, before the jury was selected in the case at bar, the court held a hearing on defendant's motion to suppress evidence. Evidence showed that on November 26, 1963, defendant went to Moore's residence and later that day met with Moore when defendant was driving the truck which was later seized. Moore handed something to Ziak, then re-entered the truck and left. Agent Turnbou told agent Hughes (who was in charge of the investigation) that he purchased narcotics from Moore.

It is clear that probable cause existed for seizure of the vehicle prior to the date of the arrest and search. Once it was lawfully seized and in possession of agents, no warrant or consent of the owner was necessary for the search. *Sirimarco* v. *United States, supra.*

We find no error in regard to the search of the truck.

3. During the cross examination of government agent Turnbou by defense counsel, questions were asked about one Gus Kountis. Similar questions were asked on cross examination of agent Halpin. Halpin testified:

> "I had nothing to do with Kountis other than the fact that after his arrest, I was advised by radio and I went down—just prior to his arrest, and arrived about the time the arrest was made, and that was all I had to do."

After Mr. McDonnell, defense counsel, stated that he had no further questions, Mr. Brown, assistant district attorney, stated:

> "Your Honor, in view of the last series of questions, I will ask the Court to take judicial notice of the fact that Gus N. Kountis was tried and convicted before you involving the charge of possession of heroin, possession on the 9th day of March of 1964. That matter was adjudicated by you."

Defense counsel objected "in the presence of the jury" and stated:

> "He is testifying, Judge. He is not on the witness stand."

The court then told Brown that he could bring in a certified copy of the conviction if he wanted to and Brown said that he would do so. The court then adjourned for the day.

Two days later arguments were heard from both sides concluding with a final argument by Mr. Brown. When he reached that part of his argument in which he was discussing the credibility of witnesses, he said, in part:

> "* * * It's a sad day not for Ziak, not for the county, but for everybody when the Federal Government would attempt to frame somebody. And I submit to you that we have not, we didn't in this case, and we won't. And there is a very good point to bring out on that.
>
> "He said we framed him. That's what he is telling you—that all of these agents got up on the stand and committed perjury. I told you in advance that I had talked to all the witnesses, and I suppose the next thing is that I suborned the perjury. Well, whatever the facts may be as far as he is concerned, let me say this to you: If we had wanted to frame the defendant, don't you think that we would have done it on the whole cloth? At the time of his arrest, Hughes would have marched up on the stand along with six other agents, and sat down on the witness stand and said, 'Ziak, we caught you selling narcotics. You and Moore were in a conspiracy.' And what would he have said if he wanted to frame him? He would have said, 'Ziak told them'—"

At this point defense counsel objected on the ground that Mr. Brown was sitting *on the witness stand* while giving his closing argument.

The court overruled the objection and, as far as the record shows, Mr. Brown continued to sit on the witness stand before the jury during the remainder of his argument, when he said, among other things:

> "Ladies and gentlemen, these agents came in and told you the truth. They told you the way it happened. * * * "

Here was a prosecutor sitting in the place reserved for persons who customarily give testimony upon which juries rely in deciding cases. It is an historical location in every American courtroom. It is a symbol of truth and justice and so recognized by the triers of fact. Yet on the important issue of the veracity of government witnesses, a lawyer for the government was permitted to occupy that seat and, without being sworn as a witness, was allowed to tell the jurors that the (government) agents told them the truth.

We disapprove of such theatrical tactics in a federal court of law. Only because of our abiding confidence that the intelligence of the jurors in fact rejected this performance, do we refrain from reversing the judgment of conviction in this case. We trust that in this circuit the witness box will be henceforth used only for witnesses.

For the reasons hereinbefore stated, the judgment order from which this appeal was taken is affirmed.

JUDGMENT ORDER AFFIRMED.

SWYGERT, *Circuit Judge,* concurs in the result.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

Opinion by Judge Schnackenberg
(Swygert, C. J. concurs in result)

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago 10, Illinois

Wednesday, April 20, 1966

BEFORE

HON. ELMER J. SCHNACKENBERG, *Circuit Judge*

HON. LATHAM CASTLE, *Circuit Judge*

HON. LUTHER M. SWYGERT, *Circuit Judge*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. JOHN JOSEPH ZIAK, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 15175

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment order of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Thursday, June 9, 1966

BEFORE

HON. ELMER J. SCHNACKENBERG, *Circuit Judge*

HON. LATHAM CASTLE, *Circuit Judge*

HON. LUTHER M. SWYGERT, *Circuit Judge*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* No. 15175 vs. JOHN JOSEPH ZIAK, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

IT IS ORDERED by this Court that the petition for rehearing of this cause be, and the same is hereby, DENIED.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 318

JOHN JOSEPH ZIAK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is at 360 F. 2d 850.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 1966. A petition for rehearing was denied on June 9, 1966. The petition for a writ of certiorari was filed on July 6, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the closing argument of government counsel required reversal of petitioner's conviction.

STATEMENT

Petitioner was convicted by a jury in the United States District Court for the Northern District of Illinois of knowingly receiving and facilitating the transportation and sale of narcotic drugs, in violation of 21 U.S.C. 174, and conspiracy to commit that offense (R. 3-5, 18-19).[1] He was sentenced to imprisonment for a period of eight years on each count, the terms to run concurrently (R. 20). The court of appeals unanimously affirmed (Pet. App. A).

1. The government's evidence at trial may be summarized as follows:

On November 12, 1963, Narcotics Agent Turnbou arranged through an informant to purchase narcotics from Sylvester Moore, petitioner's alleged co-conspirator, who died before the time of indictment (App. 13). The sale was arranged by telephone, Moore telling the informant that he would call him back. At about 7:15 p.m., petitioner came to Moore's home and remained for a few minutes (App. 25). At about 7:30 p.m., Moore called the informant and told him he would bring over the narcotics (App. 13).

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[1] The record consists of the single volume "Original Record on Appeal" ("R."), the four volume transcript of proceedings ("Tr.") and petitioner's Appendix filed in the court of appeals ("App.").

Moore subsequently came to the informant's home and sold the narcotics for $900 (App. 13-14, 25).

On November 26, 1963, Agent Turnbou again arranged to purchase narcotics from Moore. The time set for delivery was approximately 8:30 p.m. Petitioner arrived at Moore's home at about 7:30 p.m. and remained for ten minutes. Moore then left and went directly to deliver the narcotics (App. 14). After the transaction, Moore proceeded to a rendezvous with petitioner, at which Moore handed an unidentified object to petitioner (App. 14, 17-18, 22). Moore then went home (App. 18).

On December 9, 1963, Agent Turnbou made similar arrangements. Delivery time was set for 8:00 p.m. Petitioner went to Moore's home at about 6:45 p.m. About fifteen minutes later, Moore left to make the narcotics delivery (App. 15). After the sale, Moore proceeded to a location where petitioner was parked in his car and handed petitioner a large quantity of currency (App. 15, 18-23, 25-26). Moore then went home (App. 21).

On April 27, 1964, petitioner was arrested pursuant to a warrant as he alighted from his truck (App. 8, 23). A search of the vehicle revealed a brown paper sack containing heroin lodged over the sun visor (App. 23, 27-28). Petitioner denied knowing Moore, receiving money from Moore or having been at any of the locations reported by observing agents (App. 27). The narcotics found at the time of arrest formed the basis of the substantive count.

2. In closing argument, defense counsel maintained that the government had "framed" petitioner on the

substantive count by planting the narcotics in his truck at the time of arrest (Tr. 355-362). This conclusion, counsel stated, was supported by the facts that one agent testified that the narcotics were in a "brown manila envelope" while another agent testified that there was a brown paper bag with the envelope inside it (Tr. 357); that the package was not submitted for fingerprint analysis (Tr. 358); and that government counsel did not call as witnesses two agents who were present at the arrest and who no longer worked for the Bureau of Narcotics (Tr. 360-361). In addition, defense counsel repeatedly asserted his personal belief that petitioner was the one telling the truth (Tr. 351, 358-359).

Government counsel responded to the argument that petitioner had been "framed" in part as follows (Tr. 364-365):

> The two men he referred to were two agents that have left here, Agent Russo, and the other agent was Aison. He said the Government didn't call them.
>
> Ladies and gentlemen, that big tremendous machine that he indicates is the Government is me. I didn't call them. I didn't ask them to come in here. I didn't subpoena them. And I will tell you why I didn't call them in to testify —because I won't insult this man right here, Narcotic Agent Hughes. I'm not going to put those men on the stand to swear to God and in front of you that he is telling the truth. I know him and I won't do it. And if you think he got up on that stand as part of a master plot to frame John Joseph Ziak, then I say to you this:

> It's a sad day not for Ziak, not for the country, but for everybody when the Federal Government would attempt to frame somebody. And I submit to you that we have not, we didn't in this case, and we won't. And there is a very good point to bring out on that.
>
> He said we framed him. That's what he is telling you—that all of these agents got up on the stand and committed perjury. I told you in advance that I had talked to all the witnesses, and I suppose the next thing is that I suborned the perjury.

Government counsel then sat on the witness stand and related what testimony, in his view, would have been produced in a true "frame-up" (Tr. 365).[2] Counsel then stated:

> Ladies and gentlemen, these agents came in and told you the truth. They told you the way it happened * * * And you heard men get up there and tell the truth.
>
> You determine who told the truth * * *.

ARGUMENT

1. Government counsel's remarks in closing argument, set forth in the Statement, *supra*, pp. 4-5, were made in response to charges in petitioner's argument that the government had deliberately "framed" petitioner; that relevant evidence and testimony had pur-

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[2] Defense counsel's objection to any closing argument while sitting in the witness stand (Tr. 365) was overruled. While the record does not indicate how long counsel occupied the seat, it was, in fact, about 45 seconds covering about nine transcript lines of final argument. See Second Supplemental Record on Appeal, affidavit by Douglas Brown.

posefully been suppressed; and also in response to assertions by petitioner's counsel of his personal belief in petitioner's credibility. Petitioner's argument therefore "invited the reply which petitioner * * * now attacks." *Lawn* v. *United States*, 355 U.S. 339, 359-360, n. 15. See also, *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 238-242; *Crumpton* v. *United States*, 138 U.S. 361, 364; *United States* v. *Kiamie*, 258 F.2d 924 (C.A. 2), certiorari denied, 358 U.S. 909; *United States* v. *Battiato*, 204 F.2d 717, 718-719 (C.A. 7), certiorari denied, 346 U.S. 871. Defense counsel, moreover, interposed no contemporaneous objection to the substance of the government's remarks, but only to counsel's presence in the witness chair during part of his argument (Tr. 365). While some of government counsel's remarks were subject to criticism, see *Greenberg* v. *United States*, 280 F.2d 472 (C.A. 1); *United States* v. *White*, 324 F.2d 814, 816-817 (C.A. 2), we submit that they did not constitute reversible error in these circumstances. *United States* v. *Socony-Vacuum Oil Co.*, *supra*; *Medlin* v. *United States*, 353 F.2d 789, 795-796 (C.A. 6), certiorari denied June 6, 1966, No. 1228, O.T., 1965.

2. The court of appeals rebuked government counsel for sitting in the witness chair during closing argument, but did not reverse the conviction on this account (Pet. App. 5-6). There was, in fact, only a brief period during which counsel occupied the witness chair and told the jury what they would have heard had the government actually framed petitioner. (See footnote 2, *supra*, p. 5.) The jury, therefore,

could not have viewed government counsel as a witness giving evidence or testimony relevant to the factual issues in the case. Moreover, contrary to petitioner's assertion (Pet. 13-14), the jury was not left unguided by the trial court concerning argument of counsel. The court affirmatively instructed the jury that "[s]tatements and arguments of counsel are not evidence. They are only intended to assist the jury in understanding the evidence and the contentions of the parties" (Tr. 378). In these circumstances, disapproval by the court of appeals of the physical act of sitting in the witness chair during closing argument did not require reversal of the conviction. See *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. at 239.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

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PAUL C. SUMMITT,
Attorneys.

AUGUST 1966

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